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No. 88-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, THE CITY OF NEW ORLEANS

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QUESTION PRESENTED

Whether this Court should review a purely factual, contractual dispute that is governed by state law, that does not impinge upon the very limited federal interest involved, and that has no precedential value?

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STATEMENT OF THE CASE

United complains that the decisions rendered by the Louisiana state trial court and appellate court, imposing liability on United for negligently causing natural gas curtailments, impinge upon a federal interest. The United States Fifth Circuit Court of Appeals (the "Fifth Circuit"), however, has stated that in this context the federal interest is extremely limited and is not applicable where a pipeline is negligent or at fault for causing a shortage on its systems.[1]

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[1] *United Gas Pipe Line Co. v. Federal Energy Regulatory Commission*, 824 F.2d 417 (5th Cir. 1987) (*"United v. FERC"*).

In *United v. FERC*, the court noted that although there is a federal interest in protecting the federal curtailment scheme, "the public interest require[s] the abrogation of contract liability based solely on compliance with the filed curtailment plan, but [does] not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct."[2] The federal interest, therefore, requires only that United be exculpated from contractual liability "in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern."[3] The court defined fault as being generally synonymous with negligence.

As the Louisiana state courts imposed liability on United based on their findings of United's mismanagement of its gas supply and sales programs, its improvidence, and its fault and negligence, neither the federal courts nor the Federal Energy Regulatory Commission ("FERC")[4] have any interest in this matter.[5] The Commission, in another proceeding involving the extent of the federal interest, clearly limited such interest to "strict liability":

> The Commission has a strong interest in the uniform treatment of pipelines that properly observe this goal by curtailing in accordance with their curtailment tariffs as they are required to do by Federal law. On the other hand, we do not perceive a similar Federal interest in ensuring treatment for claims of negligence or omissions in dealing with pipelines and

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[2] *Id.* at 426-27.

[3] *Id.* at 427-28.

[4] The Federal Energy Regulatory Commission ("FERC") is the successor to the Federal Power Commission ("FPC"). The FPC's functions were transferred to FERC in 1977. *See*, 42 U.S.C. § 7172(a). Both commissions are generally referred to as "FERC" or the "Commission".

[5] *Transcontinental Gas Pipe Line Co.*, 35 FERC (CCH) ¶ 61,043, 61,073 (1986) ("*Transco*").

their individual customers that are subject to court redress.[6]

In *United v. FERC*, the Fifth Circuit confirmed FERC's position that factual determinations of a pipeline company's negligence in its gas acquisition and sales program resulting in curtailments present a question of state law. Accordingly, there is no federal jurisdiction for this Court to review the state court action as there is no basis for it under either the United States Constitution or the Natural Gas Act.

A. Historical Perspective

The City Council of the City of New Orleans (the "City of New Orleans") is a local regulatory body that regulates the utilities operating within the boundaries of Orleans Parish. Louisiana Power & Light Co. ("LP&L") is an electric utility that services the Algiers section of the City of New Orleans, as well as numerous other Louisiana parishes. The service to the Algiers customers is regulated by the City. LP&L's service in other parishes is regulated by the Louisiana Public Service Commission (the "LPSC"). The LPSC and the City of New Orleans have participated in this case and in the FERC proceedings. This case was one of three consolidated cases brought against United.[7] As the other two cases have been settled, LP&L is the sole remaining plaintiff.

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[6] *Id.* at 61,080.

[7] The three consolidated cases were: *The City of New Orleans, et al. v. United Gas Pipe Line Company* (the "City case"); *Gulf States Utilities v. United Gas Pipe Line Company* (the "GSU case"); and *Louisiana Power & Light Company v. United Gas Pipe Line Company* (the "LP&L case"), this case. The City and GSU cases have been settled. The City case was settled, after the Louisiana Fourth Circuit Court's opinion had been rendered, for an amount of $75 million. The GSU case was settled during trial for an amount of $112 million.

Under the Natural Gas Act, gas sold for resale is jurisdictional, while industrial sales—including the sale of powerplant gas to electric utilities for the generation of electricity—is non-jurisdictional.[8] The contracts entered into between LP&L and United for powerplant gas were therefore non-jurisdictional contracts, which are not subject to FERC regulation.[9]

LP&L, the LPSC, and United itself considered the pipeline system through which United transported gas to LP&L in the 1960's an intrastate system. Nevertheless, without the requisite approval of the FPC, United commingled interstate gas into its intrastate system. On October 1, 1970, twenty-six days before filing its curtailment application, United filed an application with the Commission disclosing its commingling and alleging for the first time that its system was interstate. United sought and ultimately obtained a ruling that such commingling had converted its system into an interstate system.[10] On October 26, 1970, United filed another application with the Commission stating that it had encoun-

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[8] 15 U.S.C. § 717(b) (1982); *See, Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[9] LP&L entered into two firm requirement gas supply contracts with United for its maximum daily requirements. First, LP&L's Sterlington Station contract was entered into on February 2, 1956 and amended on November 30, 1966, December 2, 1969, and December 31, 1974. This contract has a twenty-five year term. Second, LP&L's Ninemile Point station contract was entered into on May 6, 1968.

[10] *See generally, United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,292 (1982): The Commission found jurisdiction "in Opinions 610 and 610-A, (47 FPC 245 and 1021) in 1972 and issued a certificate in 1973 by means of Opinions 661 and 661-A; (50 FPC 181 and 779). The Commission's findings of jurisdict[ion] and certification were affirmed on appeal in *Louisiana Power & Light Company v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied sub nom., Texasgulf, Inc.* v. *FPC*, 416 U.S. 974 (1974), and *State of Louisiana v. FPC*, 533 F.2d 1239 (D.C. Cir. 1976), respectively."

tered a shortage on its interstate system, though not its intrastate system, seeking FERC's permission to curtail. Various stages of these curtailment proceedings have been before this Court, and this Court has held that rationing gas is applicable to non-jurisdiction sales under the trans-gas is applicable to non-jurisdictional sales under the transportation provision of Section 1 of the Natural Gas Act.[11]

Immediately upon seeking approval for curtailment, United argued that it should be able to curtail to jurisdictional and non-jurisdictional customers alike without liability. Twice FERC agreed with United, stating that United would be exonerated from liability.[12] Twice the Fifth Circuit overruled FERC's determination, finding that it was not based on a sufficiently developed record.[13]

Another FERC hearing took place to determine the extent of the federal interest in placing the monetary burden of a pipeline's shortage on the pipeline's customers. In its quest, FERC was guided by pronouncements of two respected circuit courts.[14]

In *Monsanto Co. v. Federal Power Commission*, 463 F.2d 799, 808 (D.C. Cir. 1972), the court stated the issue succinctly:

> [T]he industrial user may be able to say: Given the pickle created by the pipeline company, what the FPC did was lawful and proper as to actual subsequent rationing of the limited supply of gas, but

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[11] 15 U.S.C. § 717(b) (1982); *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[12] *See generally, United v. FERC*, 824 F.2d at 421-23; Opinion No. 606, 46 FPC 786 (1971), *rehearing denied*, Opinion No. 606-A, 46 FPC 1290 (1971); Opinion No. 647, 49 FPC 179 (1973); and Opinion No. 647-A, 49 FPC 1211 (1973).

[13] *See generally, United v. FERC*, 824 F.2d at 421-23; *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973), *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974).

[14] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,286 (1982).

> the pipeline company is liable in damages because of the way it put us all in the pickle.

In *International Paper Co. v. Federal Power Commission*, 476 F.2d 121 (5th Cir. 1973), Chief Judge John R. Brown pointed out that curtailment damage suits can arise out of two possible factual scenarios and reaffirmed the D.C. Circuit's pronouncements:

> First, if a plaintiff cannot prove that "his service was reduced by anything other than a governmentally ordered curtailment resulting from an acute shortage of gas", then the "pipeline must be exonerated completely" based on the power of the federal government to abrogate private contracts to protect the public interest. The second situation would arise if the shortage "was precipitated by the pipeline's own failure to heed the signs of an impending crisis".[15]

As an example of the second situation, Judge Brown refers to pipelines having firm sales commitments, whose customers "claim that by taking on new obligations knowing full well that its resources were limited—that the pipeline has created the 'pickle' . . . and counted on the FPC to bail out with a curtailment order".

These pronouncements guided the proceedings pending before FERC. After the development of a substantial record, Administrative Law Judge Sherman P. Kimball concluded:

> Curtailment in accordance with a Commission or court-ordered curtailment plan will serve to exonerate a pipeline, provided the pipeline did not create the "pickle" in which it found itself. Of course, whether United created the "pickle" in which it found itself will be determined in court on the ques-

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[15] *Id.* at 65,286, quoting from *International Paper*, 476 F.2d at 124-32.

tion of its liability, if any, and damages to the direct sales customers herein.[16]

The Commission, affirming the Administrative Law Judge on this matter, concluded that absent United's "negligence, bad faith, fault or wilful misconduct" United would be exonerated from liability for compliance with an approved curtailment plan.[17] On rehearing, FERC did not deviate from this holding;[18] neither did the Fifth Circuit upon appeal of the FERC decision.[19]

The state courts examined in depth who "created the pickle"; they found United did so, and therefore United was held liable for the damages it caused. United seeks to relitigate the fault question in this Court. The facts found by the state courts more than support their conclusions of negligence and fault on the part of United.

B. The State Court Proceedings

On September 5, 1974, this breach of contract action was filed in state court. United unsuccessfully sought to remove this action to federal court.[20] Additionally, United unsuccessfully argued that the "total federal preemption" in this area mandated a stay of the state proceedings.[21]

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[16] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, at 65,311 (1982).

[17] *United Gas Pipe Line Co.*, 31 FERC ¶ 61,336 (1985).

[18] United Gas Pipe Line Co., 35 FERC ¶ 61,344 (1986).

[19] *United v. FERC*, 824 F.2d 417 (5th Cir. 1987).

[20] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D. La. 1974).

[21] Both the trial court and the Louisiana Supreme Court denied United's motion to stay the state court proceedings. *City of New Orleans, et al. v. United Gas Pipe Line Co.*, Nos. 575-544, *et al.* (Civ. Dist. Ct., Parish of Orleans, La., orders entered June 26, 1979 and October 23, 1981); and *City of New Orleans, et al. v. United Gas Pipe Line Co.*, No. 81-C-3104, Supreme Court, State of Louisiana, December 22, 1981, respectively.

As is shown above, the federal interest is extremely limited. During the two and a half year state court trial, seventy-five witnesses testified in person or by deposition, and the parties extensively explored the history of the natural gas and electric utility industries and the scope of federal and state regulation thereof. From this evidence, the trial court drew the following factual conclusions.

First, the trial court found that United's improvident actions caused its shortages:

> Any shortage of gas in the 1970's on United's interstate system which may have rendered it incapable of selling and delivering to LP&L the contract quantities of gas was caused by United's improvident actions. In the 1960's United released large volumes of dedicated remaining recoverable gas reserves attached to its system. In addition, United failed to purchase and attach to its systems new gas reserves that were available in the 1960's and 1970's. Furthermore, United increased its sale of gas during the 1960's without correspondingly attaching adequate new gas reserves to supply the increased sales, although it has insufficient reserves to supply these obligations and meet its existing customer requirements. All of these actions proved to have an impact when United's ability to meet the needs of its customers and comply with its contract obligations.[22]

Second, the trial court found that United's breach of its contractual obligations was caused by events within United's control; the court listed the following actions that United could have taken had it been exercising due diligence:

> United could have prevented the gas shortage it experienced on its systems in the 1970's (a) by re-

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[22] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, No. 579-040 (Civ. Dist. Ct., Parish of Orleans, La., August 24, 1984), Pet. App. C, p. 86a.

> taining instead of releasing in the 1960's large volumes of dedicated gas reserves then attached to its systems; (b) by purchasing and attaching additional gas reserves to its systems that were available at economic prices; (c) by not increasing sales of gas in the middle and late 1960's when United was simultaneously reducing its dedicated gas reserves; and (d) by maintaining a reasonable balance between dedicated gas supplies and contract demands of its customers.[23]

Third, the trial court found that United's management acted imprudently "in permitting its gas supplies to dwindle, relative to its delivery obligations to an amount that did not permit adequate service to customers." [24] In this regard, the court noted that:

> Though it was compensated (through the prices bargained for and included in its sales contract) for the risk of having to acquire new gas supplies to meet contract obligations, United did not act prudently to insure an adequate supply. As a result of United's improvidence, United became incapable of meeting its contract obligations for deliveries of gas and NOPSI, LP&L and the ratepayers of these companies had to pay more for the energy that United had contracted to deliver.[25]

Finally, as United's imprudence caused its need to curtail, the trial court found that United's compliance with FERC's curtailment orders did not exculpate it. The court stated:

> Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate

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[23] *Id.* at 89a.

[24] *Id.*

[25] *Id.* at 89a-91a.

> United from its liability herein because the court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management.
>
> . . . The court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.[26]

Turning to damages, even though LP&L prayed for more than $240 million in damages, the trial court rejected various demands, awarding LP&L a judgment in the amount of $40,309,142.00.

On appeal, the Louisiana Fourth Circuit Court of Appeal ("Louisiana Fourth Circuit"), in an opinion of more than seventy pages, found significant instances of imprudence, improvidence, fault, and negligence. One reason for the court's lengthy opinion was that United argued every conceivable defense, including federal pre-emption and numerous state law contract defenses. The Louisiana Fourth Circuit dutifully responded, discussing, but rejecting, each defense.

The Louisiana Fourth Circuit noted that "the governmental [curtailment] orders would not have been necessary as to United but for United's self-caused shortage".[27] Affirming the trial court's findings, the court described United's actions causing the curtailments as follows:

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[26] *Id.* at 94a, 97a.

[27] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 517 So.2d 145 (La. App. 4th Cir. 1987), Pet. App. A at p. 4a.

> United did not exercise the reasonable foresight that good faith performance of its contracts required. To the contrary, the evidence is that for business reasons aimed not at performance of its contracts but at saving costs, United released substantial reserves, which would have met then-current needs for several years, and did not acquire others at a time when at least some could have acquired, and increased delivery commitments by additional sales despite declining reserves. . . . United's proof does not demonstrate error in the trial judge's basic conclusion that, on both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an effort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform those contracts.[28]

Further, the Louisiana Fourth Circuit affirmed the trial court's finding that had United exercised due diligence it could have prevented its shortage. The court stated:

> The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused. In such a factual situation, the *force majeure* clauses by their own definition do not apply and therefore did not suspend United's obligations.[29]

Finally, the Louisiana Fourth Circuit reaffirmed the trial court's conclusion that:

> On both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an ef-

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[28] *Id.* at 15a.

[29] *Id.* at p. 16a.

> fort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform these contracts.[30]

The court increased LP&L's damage award to $90,-014,543.00. Subsequently, it denied rehearing, and the Louisiana Supreme Court denied United's Petition for Writs of Certiorari or Review,[31] despite United's attempt to create the implication that the Louisiana Supreme Court ought to review the lengthy decisions to "comply with" the Fifth Circuit's decision. The Louisiana courts, in evaluating the arguments of United, apparently concluded that the findings of negligence were so overwhelming, that they more than met the test enunciated by the Fifth Circuit.

REASONS FOR DENYING THE PETITION

I. This factual dispute presents a contractual liability issue governed by state law: federal preemption is inapplicable, as negligence was established.

The Louisiana Fourth Circuit correctly concluded that this factual, contractual dispute is governed by state law. The court stated that:

> Notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards.[32]

Hence, it properly distinguished the limited federal interest from the state law questions. Its focus is precisely the one subsequently described by the Fifth Circuit.

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[30] *Id.*

[31] Pet. App. B at 76a; Pet. App. D at 114a, respectively.

[32] Pet. App. A, p. 18a.

The Fifth Circuit established that in order to determine fault or negligence, a state standard rather than a uniform federal standard is applicable.[33] Whether there is fault or negligence, therefore, must be decided by a court applying principles of state law. This is exactly what the Fourth Circuit considered its task, as is shown by the above quotation.

In this protracted litigation, the Louisiana state courts developed one of the most extensive records ever compiled in the state courts' history.[34] United, nonetheless, now invites this Court to re-determine whether the numerous factual findings developed in a two and a half year long trial are sufficient to support a finding of negligence. United asks this Court to second-guess the trial and appellate courts of the State of Louisiana, and suggests that this Court ignore the numerous acts of negligence and mismanagement found by the state courts. Such would not only be a waste of judicial resources, but also outside this Court's jurisdiction: this Court does not review findings of fact.

United's allegation that the Fifth Circuit created a new "federal standard" of negligence is an attempt to contrive a federal pre-emption argument where there is none. As the Fifth Circuit stated:

> While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive.[35]

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[33] *United v. FERC*, 824 F.2d at 426-31.

[34] The trial court heard testimony comprising over 42,000 pages of transcription and reviewed over 1,654 exhibits, consisting of at least 10,000 to 20,000 additional pages.

[35] *United v. FERC*, 824 F.2d at 426.

Nevertheless, United alleges that the Fifth Circuit imposed a three-part "federal standard" of negligence: first, that it imposed an "objective unreasonableness" standard; second, that it placed on "the customers claiming damages" the burden of proof; and third, that it imposed a "proximate cause" requirement. What United has labeled as a new three-part "federal standard", however, is not only dicta, it is contrary to the Court's assertion that the federal interest is limited to "strict liability or liability without fault". Once such threshold is passed, and negligence is found, such negligence is determined in accordance with *state*, not *federal* law.

The Fifth Circuit, *sua sponte*, volunteered guidance: "A state's use of labels, 'negligence' or 'fault' thus does not necessarily satisfy the federal standard." [36] Ironically, United uses these dicta to create a new "federal" standard, which it calls the "objective unreasonableness" test. Contrary to United's contention,[37] this three-part "federal standard" allegedly established by the Fifth Circuit is clearly not part of that court's holding. The Fifth Circuit's holding was merely an affirmance of the FERC order stating that pipelines are exonerated "for contract damages arising from deliveries of natural gas curtailed in compliance with the filed curtailment plan unless United, through negligence, bad faith, fault or wilful misconduct caused the need for curtailments".[38]

Even if the merely advisory character of the Fifth Circuit language is applied in evaluating the state court decisions, it is clear that the Louisiana Fourth Circuit's factual findings fully comply with United's alleged "federal standard". First, United's argument that the Fourth Circuit failed to apply this "objective unreasonableness"

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[36] *United v. FERC*, 824 F.2d at 429.

[37] Pet., p. 15, n.16.

[38] *United v. FERC*, 824 F.2d at 420.

standard is without merit, as United merely states that the state court failed to use the label "objective unreasonableness". The Louisiana Fourth Circuit clearly found that under the then-existing circumstances United's actions were unreasonable. United is attempting to place form over substance. As the Fifth Circuit warned, legal "labels" are not dispositive: what is dispositive are substantive factual findings. United's liability is grounded in substantial factual and evidentiary determinations. As previously noted, the Louisiana Fourth Circuit found that, taken alone, United's mere failure to deliver power-plant gas was insufficient to impose liability. But that court concluded that United's acts of mismanagement, its releases, and its increased sales in an effort to boost its own financial rewards caused the shortage of gas, and that these actions, taken together, were sufficient to impose liability on United.

Contrary to United's assertions, the Louisiana Fourth Circuit's findings were made in the context of an evaluation of contemporaneous events and data. United introduced massive evidence regarding contemporaneous events, but the state courts found that such did not exonerate United. The trial court and the Louisiana Fourth Circuit also considered testimony and evidence presented by the plaintiffs which illustrated the then-current economic environment in the industry as then-known to United. Memoranda, letters and other documents all illustrated United's knowledge and awareness of these factors at the time it took its liability-causing actions. Accordingly, the state courts found United's actions "objectively unreasonable".

Second, United argues that the Louisiana Fourth Circuit misapplied the burden of proof. Under this "federal standard", the burden of proving United's culpability for causing the shortage lies with "customers seeking to impose curtailment liability upon United". United contends that the Louisiana Fourth Circuit reversed the burden

requiring it to prove that its actions were reasonable. United, however, fails to acknowledge that the plaintiff through testimony and evidence, as reflected in a voluminous record, proved to the trial court's and the Louisiana Fourth Circuit's satisfaction that United's actions of releasing reserves, not acquiring additional gas, increasing sales, and injecting interstate gas were negligent acts. Moreover, United's actions were found to be the sole cause of its shortage, and United's actions were found to be "not reasonable in the context of firm requirements contracts".[39]

The Louisiana Fourth Circuit held essentially that United's actions were not reasonable under the circumstances as they were "the failure to exercise reasonable care—they were negligent". The extensive findings in the state courts' opinions show that the plaintiff ("the customer seeking to impose curtailment liability upon United . . .") presented sufficient evidence to prove United's negligence.

Finally, United asserts that even assuming its actions were negligent, it is not liable because the Louisiana Fourth Circuit allegedly failed to apply the "proximate causation" test. Once again, United is attempting to place form over substance. The courts found that United's actions were the sole cause of its shortage. This is evident from the express wording used by the court: "[t]he reason there was a 'shortage' was that United released those reserves."[40] Moreover, the state courts

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[39] Pet. App. A, p. 9a.

[40] *Id.*

The Fifth Circuit's purpose for using "proximate cause" was to "highlight the element of foreseeability . . ." *United v. FERC*, 824 F.2d at 429. United's actions, were taken with a full awareness of the fact that it had insufficient gas on hand. United's management's strategy sessions, mapping out the best strategy in exculpating itself from liability, were documented by inter-office memoranda.

conditioned United's liability on a showing that the objectively unreasonable acts of United proximately caused non-delivery. As discussed above, United's actions were calculated to increase its profit margin; these actions, however, resulted in a shortage. United then attempted to blame its self-imposed shortage on FERC orders, the "nationwide gas shortage", and other 'fortuitous circumstances". Obviously, however, United's actions played a major role "in creating the situation that resulted in curtailments". Even if there would be other contributing causes of the breach, United's negligence was the primary cause. If negligence is the primary cause, liability for all damages follows.

Federal courts have applied the same standard to other pipelines, and a federal court has found United negligent. Such findings are thus not uniquely those of state courts. The "federal standard" touted by United was rejected by FERC in *Transco.*[41] In *Transco*, the federal court referred several issues to the Commission,[42] including the effect of Transco's compliance with a federal curtailment order on its liability to its customers. The Administrative Law Judge concluded,[43] and FERC agreed, that "a pipeline's adherence to effective curtailment tariffs would be a defense to pure contract damage claims, but that the pipeline could nevertheless be liable for damages flowing from its role in *creating the situation* that resulted in curtailment." [44]

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letters, reports, and other evidence which is part of the 42,000 pages of the record placed before the trial court and the Fourth Circuit.

[41] *Transco*, 35 FERC (CCH) ¶ 61,043, 61,073 (1986).

[42] *C.F. Industries v. Transcontinental Gas Pipeline Corp.*, 614 F.2d 33 (4th Cir. 1980).

[43] *Transcontinental Gas Pipe Line Co.*, 21 FERC (CCH) ¶ 63,032 (1980).

[44] *Transco*, 35 FERC at 61,080. (emphasis added).

The issue of proximate cause was directly addressed by the trial court in *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C. Cir. 1985), *mooted by settlement*, 617 F.Supp. 41 (1985) (*"Texasgulf"*). The plaintiff in this case was an industrial customer of United. The testimony presented and the defenses raised closely paralleled the issues considered in the case *sub judice*. Judge Gesell rejected United's attempt to find third party causes for its shortage. In *Texasgulf*, Judge Gesell stated:

> Where a plaintiff has shown, as Texasgulf has here, that a defendant's breach proximately caused the plaintiff's injury, defendant is not relieved in whole or part from liability by the existence of other contributing clauses. *See, Restatement (Second of Contracts)* § 346(a) (1981); 5 A. Corbin, *Corbin on Contracts* § 999 (1964). Even if there were other contributing causes of the breach, United's negligence was the primary cause.[45]

Nonetheless, United argues that FPC Opinion No. 647 was a contributing cause of its breach and urges that the Louisiana Fourth Circuit erred in giving no weight to this order.[46] In Opinion 647, the Commission placed 'deliveries of powerplant gas in a fourth or lowest category of priority",[47] rather than a higher category of priority. United's contention that the Fourth Circuit ignored this order is without merit. Both the trial court and the Fourth Circuit extensively addressed this issue.

First, the trial court rejected United's contention that this order exonerated it from liability for any increased fuel costs. The trial court stated that:

> Order 647 is but one in a series of orders the FPC issued as a direct result of United's shortage on its

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[45] *Texasgulf*, 610 F.Supp. at 1356.

[46] Pet., p. 24.

[47] Pet. App. C, p. 96a.

> interstate system and application for governmental intervention.
>
> . . . The Court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.[48]

Second, the Fourth Circuit found that this order offered United "no escape from liability". The court stated that:

> There is only one essential thing that must be said about the federal orders adopted to cope with the shortages of gas that developed on United's interstate and its Louisiana intrastate pipelines. The essential thing is that those orders did not expropriate any of United's gas or otherwise prevent United from using whatever gas it had to make deliveries to its customers. Those orders are not the cause of United's failure to meet its contractual delivery obligations to its customers, including LP&L and NOPSI. Those orders did no more than establish, because United cannot supply all of its customers, a priority among its customers an entitlement to the gas United did have.[49]

The state courts, therefore, did not ignore this order, but rather refused to permit United to escape liability based on a mere consequence of its shortage.

As a general rule, a government order will only exonerate a party from its contractual obligation "where the

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[48] *Id.* at p. 97a.

[49] Pet. App. A, p. 16a-17a.

governmental act is not the fault of the party claiming discharge".[50] The following is a good illustration of this general rule:

> A and B make a contract under which A is to employ B for a year. B is unable to complete his performance because he is arrested and imprisoned for a burglary that he has committed. Because his inability was due to his own fault, B's duty to work for a year is not discharged, and B is liable to A for breach of contract.[51]

Like B, United's inability to perform its contractual obligations was due to its own fault: United's fault caused the shortage. Like B, therefore, United cannot rely now on governmental intervention—a curtailment order—to escape liability.

Finally, in *United v. FERC*, the Fifth Circuit stated that, "[t]he courts adjudicating the contract actions will determine what the causes of the shortage were, and whether they were beyond United's control."[52] The Louisiana Fourth Circuit did exactly that: it determined *inter alia* that United's mismanagement, its releases, and its increased sales were the "causes of the shortage", and that these causes were "not beyond United's control".[53]

This discussion shows that the state courts gave United almost unlimited opportunity to present its side of the story, but that these courts rejected the theories advanced by United due to a lack of a factual basis therefor. This is a far cry from United's statement in its petition to this Court that its assertions were not considered: they were considered but rejected. United now seeks this

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[50] *Texasgulf*, 610 F.Supp. at 1338, n.34, citing *Restatement (2d) of Contracts* § 264 (1981).

[51] *Restatement (Second) of Contracts* § 264 (1981), illustration 5.

[52] *United v. FERC*, 824 F.2d at 443.

[53] Pet. App. A, p. 10a.

Court to review the sufficiency of these findings, despite the fact that not only the state courts, but also the Administrative Law Judge, FERC, and a federal court have concluded that United was negligent. Yet another evaluation of United's actions would lead nowhere but to the same conclusion: United's negligence caused the shortage and the damages, and therefore those who suffered the damages should finally be compensated.

II. The state court decisions are not "aberrations".

United implies that it is a victim of a state court's parochial interests. In its writ application, United attempts to create the impression that the state courts were "hospitable forums" that "disregarded the federal mandates"; United alleges that LP&L and its "government allies" "urge[d] a potentially more sympathetic state court to substitute its own views for those of the federal reviewing court." [54] A review of the state court opinions, however, reveals that United's allegations have no basis in fact.

In their opinions, the state courts come to the following factual conclusions: that United released significant volumes of gas throughout the 1960's without acquiring new reserves; that United made substantial new sales commitments without acquiring new reserves; that United lost significant amounts of money on its long-term powerplant gas contracts that were entered into in the 1950's, providing an incentive to breach them; that United received higher prices from FERC on its interstate sales of gas than it received under its contractual arrangements with the utilities; that United failed to acquire available gas at higher prices; and that United generally was motivated by a desire to increase its profits rather than a desire to meet its duty as a public utility to serve its customers. None of United's suppliers reneged on their commitments to United; rather, United simply failed to

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[54] Pet., p. 16.

contract for the supplies it contractually obligated itself to provide.

Based on the above facts, the state courts concluded that United's actions were improvident and imprudent, that United mismanaged its gas supplies, and that United was negligent.

Although United attempts to portray this as a case of "hospitable" state courts gone astray, United's attempt is belied by the decisions of two other judges who have evaluated United's actions: Administrative Law Judge Sherman P. Kimball and Judge Gerhard A. Gesell.

First, after developing a substantial record, Administrative Law Judge Sherman P. Kimball concluded that no federal interest would be served by insulating a pipeline from liability based on "negligence, fault, misconduct or bad faith".[55] In determining the federal interest at stake, Judge Kimball made findings of fact clearly showing that the situation was not outside of United's control, and that United was at fault and negligent. Judge Kimball pointed out that: "[s]upply-demand management was certainly at least partially within United's control. . . . In the final analysis, it cannot be said that United was forced either to add new customers or to increase service to existing customers." [56]

Judge Kimball also noted that "it is significant that during the 1960's United was the only pipeline company that released reserves. What is particularly disturbing is that the company, according to its witnesses, gave up the reserves without even studying the impact of the loss on United's supply situation." [57] Finally, Judge Kimball observed that "United claims that its curtailments arose

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[55] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,286 (1982).

[56] *Id.* at 65,310.

[57] *Id.* at 65,297.

from situations entirely beyond its control, but no such finding is warranted, looking at all the facts and circumstances".[58]

Second, in *Texasgulf*, a case brought by one of United's other industrial customers, Judge Gesell applied a federal negligence standard to find United liable for mismanagement of its supplies. Judge Gesell rejected United's argument that it was a victim; he stated:

> United also tries to portray itself as merely another victim of the national gas shortage that enveloped the United States in the 1970's, but United cannot so easily lose itself in the crowd. United curtailed more service in the 1970's than any other pipeline, both in terms of gross volume and volume as a percentage of sales. . . . United's curtailments also began earlier than other pipelines and the curtailments were by no means universal. . . . United's lack of due care thus had direct and dramatic effects on its ability to deliver gas during the 1970's and more than any other factor led it to breach the gas sales agreement with Texasgulf.[59]

This language is less "hospitable" to United's cause than the conclusions of the "potentially more sympathetic state courts". A "substitution" of Judge Kimball's and Judge Gesell's views for those of the state court would only create more, rather than less, liability for United. Upon Judge Gesell's finding of liability, United quickly and confidentially settled the *Texasgulf* case.

Despite United's implications to the contrary, that the Louisiana Supreme Court did not merely ignore this matter. Rather, on numerous occasions the Louisian Supreme Court reviewed this case.[60] Accordingly, the Loui-

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[58] *Id.* at 65,310.

[59] *Texasgulf*, 610 F.Supp. at 1357.

[60] Among the issues the Louisiana Supreme Court has considered in this matter are the following: United's motion to stay the state

siana Supreme Court's denial of United's Application for Writ of Certiorari or Review was not based on a mere cursory review, as United implies. The court was well aware of the issues. Furthermore, the Louisiana Supreme Court's denial of United's Application for Certiorari may lend persuasive support to the correctness of the state courts decisions: implicit in the Court's denial is its conclusion that the case was correctly decided.

III. This case would not create a meaningful precedent.

This Court's evaluation of whether the state courts' decision based on a 42,000-page transcript and thousands of pages of exhibits was supported by sufficient facts to find United negligent will have no meaningful precedential value for the future. Despite United's predictions of the future detrimental effect of this decision, the scope of this decision is limited to the case at hand, as United's other curtailment cases have been settled. United's assertions that payment of the judgment to LP&L and its customers would have dire results on its future gas acquisition program are hollow, as any liability imposed on United in this case will be borne by its erstwhile indirect parent, Occidental Petroleum Corporation, an unregulated entity.[61]

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court proceedings and numerous other issues in 1981; several motions for recusal of the trial court, the Fourth Circuit, and Louisiana Supreme Court judges, and an application by United for supervisory writs of mandamus requesting that the appeal to the Louisiana Fourth Circuit be stayed in 1985; anti-trust claims in 1986; United's application for writ of certiorari in 1988; and United's application to stay the execution of a judgment pending United's application to this Court.

Additionally, the Louisiana Supreme Court appointed *ad hoc* judges to cover the docket of the Honorable George C. Connolly, Jr. so that he might put his entire time and effort into the trial of this matter. During such *ad hoc* appointments and determinations, the claims of the parties were discussed.

[61] Pet., pp. ii-iii.

This Court could only effect any future curtailment damage suits, if such could ever be brought again, if it could change the Fifth Circuit's opinion and the three-part negligence test that that court allegedly enunciated. The Fifth Circuit's decision, however, is final, and the pronouncements of the Fifth Circuit cannot be evaluated in this Court as the decision is non-appealable.[62]

The events giving rise to this litigation occurred some twenty years ago. During that period, the natural gas industry has undergone substantial and fundamental changes. First, as a result of the curtailments of the 1970's, pipelines no longer enter into firm-price, long-term contracts. Since the 1970's, gas supply contracts are made subject to any curtailment orders that might be entered and limit the pipeline's liability for compliance with such orders.

Further, gas supplies are presently in overabundance. The problem confronting pipelines today is not how to allocate insufficient gas supplies, but rather what to do with excess gas supplies.

Finally, pipelines have taken on a new function. Rather than acting as sellers of gas—United's role herein—pipelines are now acting more and more as transporters of gas. This new role assumed by pipelines is in sharp contrast to their former role as merchants. Even though pipelines are not relieved of their duty to maintain a sufficient gas supply to meet their contractual delivery obligations, the responsibility for maintaining a sufficient gas supply under contract is centered more and more in the pipeline's customers rather than in the pipeline itself.

The above considerations mitigate against the granting of writs in this case. This Court's resources have historically not been used to evaluate factual disputes, or disputes lacking precedential value.

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[62] The decision was rendered on August 18, 1987. None of the parties sought rehearing, or a review by this Court.

CONCLUSION

The adjudication of a factual, contractual dispute between one customer and one pipeline regarding events occurring fifteen to twenty years ago is the domain of the state courts. In this case, the state courts have developed an extensive record supporting their findings of United's fault and negligence. United's attempt to contrive a "federal pre-emption" argument is doomed to failure, as the findings of fault and negligence are properly within the state court's domain.

United has fought its liability for over eighteen years. Initially, United opposed a negligence test, arguing that regardless of its actions, it should be exonerated from liability. Subsequently, United argued that only its wilful misconduct should result in liability. In this Court, for the first time, United accepts what is inevitable: the federal interest in this area is extremely limited. As the Fifth Circuit stated, the limited federal interest requires only that United be exonerated from liability if it curtailed through no fault of its own. Clearly, this very limited federal interest has been satisfied.

LP&L's customers suffered damages throughout the 1970's, and they should finally be compensated for the higher cost of electricity that they had to pay due to United's cavalier approach to its gas supply management. Therefore, for all the above reasons, United's petition for certiorari should be denied by this Court.

Respectfully submitted,

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